

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VICKIE M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 2:21-cv-00540-BAT

**ORDER AFFIRMING THE  
COMMISSIONER AND DISMISSING  
THE CASE**

Plaintiff Vickie M. seeks review of the denial of her application for Disability Insurance Benefits. She contends the ALJ erred in evaluating plaintiff's testimony and the medical opinions. Dkt. 11. She also contends that the unconstitutional appointment of the Commissioner of Social Security meant that neither the ALJ nor the Appeals Council had authority to render decisions on her claim. *Id.* The Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

**BACKGROUND**

Plaintiff applied for benefits on May 4, 2010, alleging disability as of April 30, 2008. Tr. 189-90. She later amended her alleged onset date to the date she filed her application. Tr. 1572. She was 54 years old as of December 31, 2013, her date last insured. Tr. 189.

1 Two prior ALJ decisions on her claim were remanded from this Court by stipulation of  
2 the parties; a third was later remanded by the Appeals Council. Tr. 1213, 1547, 1593. The ALJ  
3 issued the decision now under review on June 17, 2020. Tr. 1434-49.

## 4 DISCUSSION

### 5 A. Plaintiff's testimony

6 Plaintiff argues that the ALJ failed to give valid reasons to discount her testimony. Dkt.  
7 11 at 2. Where, as here, the ALJ did not find that the claimant was malingering, the ALJ must  
8 provide clear and convincing reasons to reject her testimony. *See Vertigan v. Halter*, 260 F.3d  
9 1044, 1049 (9th Cir. 2001). An ALJ does this by making specific findings supported by  
10 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what  
11 testimony is not credible and what evidence undermines the claimant's complaints." *Lester v.*  
12 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996).

13 The ALJ found that the longitudinal medical evidence did not corroborate plaintiff's  
14 allegations, that plaintiff's activities were inconsistent with her allegations, and that plaintiff's  
15 employment search and receipt of unemployment benefits, along with her conflicting reports of  
16 whether she could work, put into question whether her continued unemployment was actually  
17 secondary to her medical condition. Tr. 1441-44.

18 Plaintiff argues that the ALJ placed undue significant on her receipt of unemployment  
19 benefits as a basis for rejecting her allegations. Dkt. 11 at 3. She asserts that while receipt of  
20 unemployment benefits can undermine a claimant's alleged inability to work full-time, the ALJ  
21 must consider whether the claimant held herself out as available for full-time or part-time work.  
22 *Id.* She contends that she did not allege total disability during the time she received  
23 unemployment benefits, but instead contended that she was unable to perform the exertional

1 demands of light work and was looking for work that would accommodate her limitations,  
2 including limitations on lifting, reaching, and prolonged standing. *Id.* at 3-4. She asserts that the  
3 need for accommodations is not inconsistent with allegations of disability. *Id.* at 4.

4       The ALJ discussed the following evidence with respect to plaintiff's receipt of  
5 unemployment benefits and her employment search: Plaintiff applied for and received  
6 unemployment benefits as of the date she stopped working, April 30, 2008; she contended that  
7 she stopped work due to a back injury. Tr. 1973, 1987, 1991. Throughout the period she received  
8 unemployment benefits, plaintiff affirmed that there was not any reason she could not seek or  
9 accept full-time work. Tr. 1991, 2007, 2017. Plaintiff stated in July 2008 that she had been  
10 diagnosed as "permanently partially disabled" because of her injuries and that "This does not  
11 hold me back in finding work or working, I just need to find something that isn't as physically  
12 demanding." Tr. 1990. She stated at that time that she was looking for work in retail and that she  
13 could not stand or sit for long periods of time and could not do heavy lifting. *Id.* Plaintiff stated  
14 in November 2008 that she was able to work even with her back issues, that she would have  
15 applied for a job if she had found one that worked with her limitations due to her back injury,  
16 and that she had been actively seeking a job by looking online and in the newspaper. Tr. 2046.  
17 Plaintiff reported in an August 2010 psychological evaluation that she had tried to get work, but  
18 employers would not hire her because of her lifting restrictions. Tr. 495. At the 2017 ALJ  
19 hearing, plaintiff testified that she only looked for and was capable of part-time work. Tr. 1503-  
20 07. Plaintiff's unemployment benefits expired on April 30, 2010, shortly before she applied for  
21 disability benefits on May 4, 2010. Tr. 1976.

22       The ALJ found that the medical evidence did not establish a substantial change in  
23 plaintiff's symptoms and functional limitations between the time when she was looking for work

1 and holding herself out as capable of full-time work, and the time after the filing of her May  
2 2010 disability application. Tr. 1443. The ALJ noted that before she amended her alleged onset  
3 date to the date she filed her disability application, plaintiff alleged an onset date of April 30,  
4 2008, the date she stopped working, but she presented herself as ready and able to work  
5 throughout the time she received unemployment compensation. Tr. 1443-44. The ALJ also found  
6 that plaintiff's statements about looking for work that wasn't physically demanding implied that  
7 she considered herself able to do work with less lifting. Tr. 1444. The ALJ noted that contrary to  
8 her hearing testimony that she only looked for and was capable of part-time work, she completed  
9 unemployment compensation paperwork indicating there was no reason she could not seek or  
10 accept full-time work. *Id.* The ALJ also found it notable that she applied for disability benefits  
11 after she had exhausted her unemployment benefits. *Id.*

12 The ALJ concluded that for a considerable time, plaintiff presented herself as ready and  
13 able to work, including affirmatively stating that there was nothing preventing her from working  
14 full-time, and that this was her account until her unemployment benefits ran out. *Id.* The ALJ  
15 found that her current claim that she was disabled is at odds with her representations that she  
16 could perform suitable work until her unemployment benefits were exhausted. *Id.* The ALJ  
17 found that these inconsistencies suggested that plaintiff experienced little actual change in  
18 symptoms and eroded the reliability of plaintiff's reports of symptoms and their limiting effects.  
19 *Id.*

20 As plaintiff acknowledges, receipt of unemployment benefits can undermine a claimant's  
21 alleged inability to work full-time. *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,  
22 1161-62. A claimant holding herself out as available for full-time work is inconsistent with  
23 allegations of disability, whereas a claimant holding herself out as available for only part-time

1 work is not. *Id.* In *Carmickle*, the record did not establish whether the claimant held himself out  
2 as available for full- or part-time work; the ALJ's reliance on the claimant's receipt of  
3 unemployment benefits during the alleged disability period was therefore not supported by  
4 substantial evidence. *Id.*

5 Here, unlike in *Carmickle*, the record establishes that plaintiff held herself out as  
6 available for full-time work. Tr. 1991, 2007, 2017. Although plaintiff later testified that she only  
7 looked for and was capable of part-time work, this testimony directly contradicts the  
8 representations she made in conjunction with her receipt of unemployment benefits. These  
9 representations provide substantial evidence to support the ALJ's finding that plaintiff's receipt  
10 of unemployment benefits undermines her allegations of disability.

11 Plaintiff stated at various times that during the period she received unemployment  
12 benefits: (1) there was nothing preventing her from working full time, (2) she was seeking work  
13 that would accommodate restrictions on lifting, reaching, and standing, (3) she was seeking only  
14 part-time work, and (4) she was disabled. Plaintiff believes the ALJ should have accepted her  
15 later testimony that she was seeking only part-time work and/or work that would accommodate  
16 her limitations, which she insists was not inconsistent with her allegations of disability. But the  
17 ALJ was not required to accept this testimony over her other representations. Although plaintiff  
18 has proposed alternative interpretations of her statements, the Court cannot reweigh the evidence  
19 nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954  
20 (9th Cir. 2002). The ALJ rationally concluded that plaintiff's inconsistent statements about her  
21 ability to work during the time she received unemployment benefits undermined the reliability of  
22 plaintiff's testimony. This was a valid reason to discount plaintiff's allegations.

1 Because the ALJ gave at least one valid reason to discount plaintiff's testimony, any error  
2 in the ALJ's other reasons for discounting that testimony would be harmless. *See Carmickle v.*  
3 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). Accordingly, the Court need not  
4 address plaintiff's arguments as to the ALJ's other reasons for discounting her testimony. The  
5 Court affirms the ALJ's assessment of plaintiff's testimony.

6 **B. Medical opinions**

7 Plaintiff argues that the ALJ erred in rejecting the opinions of treating doctor Roland  
8 Feltner, M.D., and in giving substantial weight to the opinion of consulting doctor Robert  
9 Hoskins, M.D. Dkt. 11 at 9. In general, the ALJ should give more weight to the opinion of a  
10 treating doctor than to that of a non-treating doctor, and more weight to the opinion of an  
11 examining doctor than to that of a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th  
12 Cir. 1996). Where it is not contradicted by another doctor, the ALJ may reject a treating or  
13 examining doctor's opinion only for "clear and convincing reasons." *Id.* at 830-31. Where  
14 contradicted, the ALJ may not reject a treating or examining doctor's opinion without "specific  
15 and legitimate reasons" that are supported by substantial evidence in the record. *Id.* at 830-31  
16 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

17 *I. Dr. Feltner*

18 In August 2010, Dr. Feltner completed a disability questionnaire in support of plaintiff's  
19 application for disability benefits from a retirement fund. Tr. 411-12. He checked boxes  
20 indicating that he advised plaintiff to refrain from working, that plaintiff's condition was  
21 "retrogressing," and that she could not perform any employment. *Id.* He wrote that plaintiff was  
22 limited by lumbar spine disease and bilateral knee osteoarthritis, was unable to bend, stand, or  
23 walk for prolonged periods of time, and improvement was not likely. *Id.*

1 Plaintiff stopped seeing Dr. Feltner in 2010 and reestablished care with him December  
2 2014. Tr 1401. In December 2014, Dr. Feltner completed a questionnaire in which he opined that  
3 plaintiff's standing/walking and sitting were limited to less than 2 hours each in a workday; she  
4 would miss more than 4 days of work per month; she could sit for 10 minutes at a time and stand  
5 for 20 minutes at a time; she could occasionally lift up to 10 pounds and rarely lift up to 20  
6 pounds; her symptoms would constantly interfere with her attention and concentration even for  
7 simple tasks; she would need to get up and walk for 10 minutes every 60 to 90 minutes; would  
8 need the opportunity to shift position at will; and would require unscheduled breaks. Tr. 1379-  
9 82. He opined that these limitations existed before December 31, 2013. Tr. 1383.

10 In November 2017, Dr. Feltner completed another questionnaire opining limitations  
11 similar to those in his December 2014 opinion, including that the limitations existed before  
12 December 31, 2013. Tr. 2398-2402.

13 The ALJ gave little weight to Dr. Feltner's opinions, finding that they were out of  
14 proportion to his treatment notes and the medical evidence in general. Tr. 1445. The ALJ found  
15 that Dr. Feltner provided limited treatment during the relevant period, noting that plaintiff saw  
16 Dr. Feltner only two times between the amended alleged onset date of May 4, 2010, and the date  
17 last insured. *Id.* The ALJ also found that the only opinion from Dr. Felton during the relevant  
18 period, his August 2010 opinion, did not specify plaintiff's functional limitations and instead  
19 focused on opinions that plaintiff was "disabled" and could not perform her former work or any  
20 other work, which the ALJ gave no weight as these are determinations reserved to the  
21 Commissioner. Tr. 1446.

1 Plaintiff argues that the ALJ erred in relying on the objective evidence to discount Dr.  
2 Feltner's opinions, as the findings the ALJ cited have little relevance in measuring the impact of  
3 fibromyalgia. Dkt. 11 at 11.

4 The Ninth Circuit has recognized the unique nature of fibromyalgia. *Revels v. Berryhill*,  
5 874 F.3d 648, 656 (9th Cir. 2017). Symptoms of fibromyalgia typically include chronic pain,  
6 tender points throughout the body, fatigue, stiffness, and sleep disruption, but individuals with  
7 fibromyalgia typically have normal muscle strength, sensory functions, and reflexes. *Id.* There  
8 are no laboratory tests or imaging to confirm the diagnosis; rather, it is diagnosed based entirely  
9 on the patient's reports of pain and other symptoms. *Id.* at 656-57. In addition, the symptoms of  
10 fibromyalgia can wax and wane, and a person with fibromyalgia can have good days and bad  
11 days. *Id.* at 657. For this reason, where a claimant has fibromyalgia, the ALJ should consider the  
12 longitudinal record when evaluating her RFC. *Id.* (citing Social Security Ruling 12-2p).

13 The ALJ found that the treatment notes from 2008 and 2009 contained generally  
14 unremarkable findings and that the notes from August and September 2010 provided support for  
15 some limitations, as Dr. Felton noted lumbar tenderness and range of motion limitations and  
16 signs of osteoarthritis in plaintiff's knees, but Dr. Felton did not have any further follow-up with  
17 plaintiff for these issues before December 2013. Tr. 1445. The ALJ found that Dr. Felton's  
18 treatment notes from 2014 contain generally mild or unremarkable physical and mental findings  
19 that provided little support for the extreme limitations in his opinion and that suggested  
20 improvement in plaintiff's symptoms. Tr. 1445. And the ALJ found that Dr. Felton's 2017  
21 opinion is similarly unsupported by his unremarkable findings from the period from 2015 to  
22 2017. Tr. 1446. The ALJ thus considered the longitudinal evidence, spanning the course of nine  
23



1 years, rather than singling out any individual periods of waning symptoms. This consideration of  
2 the longitudinal objective evidence does not run afoul of *Revels*.

3 The ALJ also found that Dr. Felton's opinions were inconsistent with the physical exams  
4 and other evidence of record through the date last insured, including 2012 lumbar spine imaging  
5 that did not show significant worsening from 2007. Tr. 1446. The ALJ was entitled to consider  
6 whether the objective evidence supported Dr. Felton's opinions as to the impact of plaintiff's  
7 back impairment. *See Meanel v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir. 1999) (ALJ may  
8 properly reject a treating physician's opinion that is inconsistent with the record and not  
9 supported by objective evidence).

10 Plaintiff argues that Dr. Felton's long treating relationship with plaintiff, which included  
11 treating her after her initial injury and at the onset of her fibromyalgia, should have resulted in  
12 his opinions being given more weight. Dkt. 11 at 11. Generally, the ALJ should give more  
13 weight to a treating doctor who has had a longer treating relationship with the claimant and who  
14 has had more visits with the claimant. 20 C.F.R. § 404.1527(c)(2)(i). The ALJ noted the length  
15 of Dr. Felton's treating relationship with plaintiff, discussing treatment notes from 2008 through  
16 2017, but also noted that Dr. Felton saw plaintiff only two times between the amended alleged  
17 onset date and the date last insured and thus provided minimal treatment during the relevant  
18 period. Tr. 1445. The ALJ was entitled to find that the minimal treatment during the relevant  
19 period outweighed the length of the treatment relationship. The Court cannot reweigh these  
20 factors. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (the Court may neither reweigh  
21 the evidence nor substitute its judgment for that of the Commissioner).

22 Plaintiff does not specifically challenge the ALJ's reasons for discounting Dr. Feltner's  
23 2010 opinion. Opinions that fail to specify functional limitations are not useful determining a

1 claimant's residual functional capacity. *Ford v. Saul*, 950 F.3d 1141, 1156 (9th Cir. 2020). And  
2 an opinion on an issue reserved to the Commissioner, such as an opinion that a claimant is  
3 "disabled" or "unable to work," is not a medical opinion and is not entitled to any special  
4 significance. 20 C.F.R. § 404.1527(d). The ALJ validly discounted Dr. Feltner's 2010 opinion.

5 The ALJ gave specific and legitimate reasons, supported by substantial evidence, to  
6 discount Dr. Feltner's opinions. The Court affirms that assessment.

7 2. *Dr. Hoskins*

8 In December 2010, Dr. Hoskins reviewed the record and affirmed the initial-level  
9 determination from July 2010 that plaintiff could perform light work with postural and  
10 environmental limitations. Tr. 769-76, 812. The ALJ gave Dr. Hoskins' opinion substantial  
11 weight, finding that the limitations were supported by a summary of the evidence and were  
12 largely consistent with the evidence of record, including degenerative changes of the lumbar  
13 spine with no diminished motor strength or sensation upon examinations. Tr. 1444. The ALJ  
14 nevertheless accounted for the evidence of knee osteoarthritis and "bad" days with body-wide  
15 pain and included additional postural and environmental limitations. *Id.*

16 Plaintiff argues that the ALJ erred in giving weight to this opinion because Dr. Hoskins  
17 did not provide any explanation in support of his opinion and did not attest that he had reviewed  
18 plaintiff's file or the summary of the evidence but merely noted the data in the file. Dkt. 11 at 11-  
19 12.

20 Dr. Hoskins stated as follows: "This is to affirm that I have noted the data in the file and  
21 find the evaluation of 7/3/10 is affirmed." Tr. 812. Plaintiff does not explain how an affirmation  
22 that he noted the data is insufficient and an attestation that he reviewed the record is required.  
23 The ALJ is entitled to draw reasonable inferences logically flowing from the record. *Tommasetti*

1 *v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (citing *Sample v. Schweiker*, 694 F.2d 639, 642  
2 (9th Cir.1982)). The ALJ could reasonably infer Dr. Hoskins' statement to mean that he had had  
3 reviewed the record and the summary of the evidence in affirming it.

4 Moreover, the ALJ found that the underlying July 2010 assessment that Dr. Hoskins  
5 affirmed was consistent with the evidence in the record and supported by a summary of that  
6 evidence. Tr. 1444. These were valid reasons to give weight to that assessment and Dr. Hoskins'  
7 affirmation of it. The ALJ did not err in assessing Dr. Hoskins' opinion.

### 8 C. Separation of powers

9 Plaintiff argues that the administrative proceedings were tainted by the unconstitutional  
10 appointment of the Commissioner of Social Security in violation of the separation of powers  
11 doctrine. Dkt. 11 at 12-18. This Court recently addressed the separation of powers issue in *Lisa*  
12 *Y. v. Commissioner of Social Security*, -- F.Supp 3d--, No. 21-5207-BAT, 2021 WL 5177363 at  
13 \*5-8 (W.D.Wash. Nov. 8, 2021). In that case, this Court concluded that while 42 U.S.C.  
14 § 902(a)(3) violates separation of powers, the violation was not grounds to reverse the  
15 Commissioner's final decision and remand the case to the agency. *Id.* For these same reasons, the  
16 Court finds that the separation of powers violation is not grounds to reverse and remand this  
17 case.

### 18 CONCLUSION

19 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is  
20 **DISMISSED** with prejudice.

21 DATED this 10th day of December, 2021.

22  
23 

BRIAN A. TSUCHIDA  
United States Magistrate Judge